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AMERICAN COURTS-MARTIAL.

BY WILBUR LARREMORE.

THE adverse criticism upon American Courts-Martial, if not constant, is at least periodical and systematic. The sentiment of lawyers toward the methods of military justice is frankly contemptuous. It is doubtful whether Courts-Martial do not contribute more largely to the stock anecdotes of professional derision than even the courts held by bucolic Justices of the Peace. When one member of the bar cites the instance of a farmer Judge deciding a point of law in a civil case upon the authority of Cushing's "Manual of Parliamentary Procedure," another may retort with an authentic ruling by a Court-Martial that, though hearsay evidence is incompetent, hearsay based upon hearsay, that is a story that has passed through two mouths instead of one, is entirely unobjectionable. Nor is the attitude of members of the bar one merely of superficial jocosity; they are seriously convinced that the system itself is unscientific, and that, when justice is done, it is in spite of defective method and grievous obstacles. The sentiment of the laity quite substantially concurs with that of the bar.

Singularly enough, at first sight, the class who seem least concerned by scientific imperfections is the very class practically affected—members of the Army and Navy themselves. The general acquiescence of military officers in the antiquated features of judicial inquiry would seem to indicate an unjudicial habit of mind which goes far to account for the vagaries committed by Courts-Martial in practice. One result of a military education is to breed a special temperament, marked primarily by reverence for authority, and, secondarily, by a strong feeling of caste. Naturally, men of the military habit of mind acquiesce without question in the authority of existing law, as

well as in that of superior officers. The sense of caste causes members of the service to cling to the institution of trial by a body of what they consider their peers. This sentiment has a legitimate basis in utility, and it is not my purpose to advocate the abolition of trial of military men by military officers. That the service itself is not strenuously concerned in any proposed change is no reason why criticism from outside should be condemned as officious or impertinent. Such a view would discountenance the spirit of missionary reform the world over in all departments. It is believed that, with some important but not subversive modifications, the system of Courts-Martial might be made sufficiently scientific, while retaining its distinctive and valuable features.

The unscientific character of the present system principally results from the concatenation of functions imposed upon a judicial Pooh-Bah, known as the "judge-advocate." The very title of the officer is balefully significant. The scientific method, as applied to jurisprudence, as well as in other fields, consists simply of abstract generalization from large numbers of observations of particular cases. A universally conceded conclusion which has been reached by that method is, that no man may safely be trusted to act both as judge and advocate. Even though no motive of direct personal gain exist, there are the considerations of pride of opinion and inevitable emotional championship of a cause which may have been espoused merely through force of circumstances. In the determination of criminal controversies in the regular law courts, a factor that is constantly arising is the intemperate advocacy of the public prosecutor. Many convictions are reversed by the civil courts every year because of the possibility of injustice flowing from a district attorney's blind zeal to carry his point. Theoretically, a public prosecutor is a quasi-judicial officer; he is expected not unduly to press for a conviction if the fact of guilt be doubtful. Actually, he becomes a strong partisan; and, in spite of the fact that the trial is presided over by an independent judicial officer, he often hounds the prisoner with such narrowness of vision and bitterness of invective that appellate tribunals are forced to undo the result of his work.

Under our American system, the authority appointing a Court-Martial designates the place for holding the court, the hour of meeting, the members of the court, and a judge-advocate. It is

enacted that the judge-advocate "shall prosecute in the name of the United States, but when the prisoner has made his plea he shall so far consider himself counsel for the prisoner as to object to any leading questions to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself." It is also laid down that, while the court is in open session, "the judge-advocate shall respectfully call the attention of the court to any irregularities in its proceedings. He should act as legal adviser of the court so far as to give his opinions upon any point of law arising during the trial, when it is asked by the court, but not otherwise." The judge-advocate is thus made the really responsible legal factor of military trials, and, to add to the anomaly of the situation, he is not required by law to be a lawyer by profession, nor are any qualifications of legal knowledge prescribed. In practice, the persons designated as judge-advocates, at least for important Courts-Martial, are usually officers of some legal attainments and of experience in the conduct of trials. Nevertheless, some of the most delicious legal solecisms in circulation consist of opinions given by judge-advocates which became the foundation of rulings by military courts. The section of the Articles of War above quoted makes it the duty of a judge-advocate to object in the prisoner's behalf to leading questions. We venture to say that many gallant soldiers have officiated as judge-advocates who had not the remotest idea what a leading question was. It may be remarked incidentally that the provision itself is unwise and inadequate. Much more important would it have been to provide for the exclusion of "hearsay" evidence. Leading questions—questions whose form suggests the answer expected—are not absolutely barred in civil trials. They are commonly made use of to bring out facts as to which there is no dispute, and the allowance or exclusion of them rests in the discretion of the court. "Hearsay," on the contrary, is rigidly barred. Trial by "hearsay" would be equivalent to trial by common rumor or village gossip. Perhaps there is no single rule quite so essential for the administration of justice as that which confines a witness to original evidence derived from his own observation and knowledge.

The responsible judicial officer should be placed upon the bench and should be entirely freed from the entanglements of advocacy. In the German system, civilian judges sit with the officers as part

of a Court-Martial. The writer believes that our American system can best be reformed by taking a leaf out of the German book. In the comparatively recent German case of Sergeants Marten and Hickel, the civilian members of the court did effective service in preventing the railroading of probably innocent men to their death. The arbitrary disposition of the military members of that court, in conjunction with the attitude of the French court in the Dreyfus case, ought to furnish an object-lesson to the entire world of the danger of trusting the administration of justice to the spirit of militarism. This spirit is apt to work injustice in favor of, as well as against, accused persons. As to many American Courts-Martial during the past few years, the bar and the public have concluded that palpably guilty men had been whitewashed. An indulgent professional sympathy crops out, especially in trials for offences not primarily against the service itself, such as financial irregularity or cruelty to prisoners or barbarous combatants. The difficulty is that a Court-Martial is too sensitive to caste sentiment, whichever way it happens to set. Abstract justice would be promoted by the presence of at least one trained lawyer on every military tribunal. The administration of justice is a science. It is fatuous in the extreme to conclude that military trials may safely be conducted without some infusion of the exact scientific spirit.

Our law should be amended so as to provide for the creation of a board of military judges to be appointed by the President. Membership of the bar of from five to ten years should be a condition of eligibility, and it might be wise to have them attached and primarily responsible to the Department of Justice, rather than to that of War. When a Court-Martial is appointed, one of these judges should be designated as its presiding officer, and he should have the sole right of ruling upon questions of the admissibility of evidence. It would be well to have the other members of the court continue to consist of military officers, but it would also be expedient to have the civilian member join in their deliberations and entitled to one vote on the judgment to be rendered. His participation in the conference would tend to prevent illogical and inconsistent action, and the position he took would be a guide to the Secretary of War, or the President, in reviewing the judgment. The proposed reform is scientific, as in jurisprudence and juridical methods successful reforms have ever

been evolutionary and not revolutionary. The scheme in view would preserve the essential features of the present combination judge-and-jury system, while introducing a scientific policy which now is lacking. Combination judge-and-jury tribunals exist as features of our civil judicature. Causes in equity are tried both as to fact and law by a single judge. Many cases both in law and equity are so tried by one or more referees. The feature of trial by one's peers would remain, and on most of the questions coming before military courts, and especially on issues of alleged conduct unbecoming an officer and a gentleman, a verdict by persons trained in military practice and tradition is desirable. The writer would strenuously oppose the entire abolition of military members and the creation of purely civilian tribunals, nor does he believe that a separate military Court of Appeal is necessary, both of which propositions have been advocated with considerable force. (In England, judgments of Courts-Martial are reviewed by the Judge-Advocate-General of the Army as criminal cases in the law courts are reviewed by the Home Secretary.) The office of advocate for the prosecution should be continued, but it should be shorn of its judicial features, and probably it would be well to prescribe for such officers some qualifications of legal education and experience. The accused should be permitted to be represented by any counsel, civilian or military, he may choose, and provision should be made for assigning him counsel, if he have none, in the discretion of the court.

The NORTH AMERICAN REVIEW for February, 1899, contained a communication by Mr. Earl M. Cranston on "The Existing Court-Martial System," which pointed out some of the evils here treated of, and, among other things, contended that the existing right of challenge should be extended. So far as our observation goes, no serious injustice has resulted on this score. It will be remembered that, upon the convening of the Schley Court of Inquiry, one of its members was successfully challenged for bias and compelled by his fellow members to retire, whereupon an acceptable substitute was appointed. It would, however, be entirely proper to provide for challenge of designated members of a Court-Martial, or of Inquiry, directly to the appointing power and before the court meets. If the hearing and determination of challenges be restricted to the court itself, there is the possibility—experience does not disclose a probability—of having to appeal to

a tribunal all of whose members are biased, and therefore predisposed to stand by one another. There are other minor features of reform which might well be considered if the system of military courts were subjected to a general overhauling. The present discussion is substantially confined to what are deemed crucial defects.

To the proposition above detailed for a military tribunal presided over by a civilian judge, two objections may be suggested and answered. First, it might be feared that the civilian president would morally overawe his associates and virtually constitute a court sole. The experiences even of civil justice tend to show that such apprehension is groundless. The writer has been informed by two judges of courts of general civil jurisdiction, each of them of large experience in conducting jury trials, that jurors are apt to resent any attempt at influence by the trial judge. They accept the law of a case from the bench without demur; but, realizing that the determination of the facts is their province, they wish to discharge their duty without moral coercion. A biased charge by a judge often leads at least to a disagreement in a case where the jurors would unanimously have taken the judge's view of the merits if he had kept his hands off. The situation is different in England, where juries notoriously are clay in the hands of the judicial potter. But there is no doubt that the spirit of democratic independence to a large extent dominates the American jury-box. Cases, indeed, are not so very rare in which an ultra-conscientious juror will protest and even refuse to be recorded when a judge directs a verdict as matter of law—a purely technical form of procedure, for which the jury has no actual responsibility whatsoever. If this be the disposition of ordinary laymen, how much more independent would be a board of experts passing upon questions in their particular department of expertism! Not only would they be quick to resist any infringement of their professional prerogative and personal dignity, but, in the very nature of things, their expert judgment would have to be the substantially controlling factor. It is inconceivable that the presence of a lawyer as a member of the Schley Court of Inquiry could have rendered the results of its deliberations anything but essentially expert verdicts on purely naval questions. Such an addition to the court, however, probably would have avoided much uncertainty and confusion on matters of evidence

which arose at the beginning of and indeed throughout the trial. A civilian with legal training might also have prevailed upon the revered and beloved Admiral of the Navy to abstain from expression of an opinion upon a matter which was not referred to the court, and as to which all evidence had been sedulously excluded.

The second objection may be indicated by the reply of an official of high military standing, to whom the proposition was submitted in conversation: "It is absolutely necessary for the preservation of discipline that a deserter shall be shot the next morning at sunrise." This attitude of mind furnishes the key to the standing reproach that "Courts-Martial are organized to convict." If an alleged deserter is to be shot anyhow the next morning, it is far better that it be done without a farcical form of judicial investigation. The necessity for headlong haste certainly does not exist in time of peace. Justice deliberately and certainly rendered is more impressive as an example than official murder based on half-digested hearsay and appearances. It is further submitted that experience does not suggest the need of great precipitancy even in time of war. In the war of the Rebellion, the armies of the North contained many men halting between two loyalties, and thousands of drafted men and substitutes for hire. These improvised armies, moreover, were without the military traditions and inurement to danger possessed by regulars. In spite of these facts, and of the further circumstance that quite early it became known that President Lincoln was disposed to pardon practically every deserter within reach of a telegraph wire, at no time was any army or division threatened with anything like serious decimation. It is precisely when the need of haste is represented as greatest that most horrid injustice is apt to be done by a "drum-head" court. On the other hand, it would be perfectly feasible to have military judges present at the scene of hostilities to conduct trials of offenders, and see to it that the essential principles of scientific justice were administered before they were condemned. It could be provided by law for the increase of judges in time of war by temporary appointment.

The NORTH AMERICAN REVIEW for May, 1899, contained a valuable article on "Courts-Martial in England and America," by the Rt. Hon. Sir F. H. Jeune, Judge-Advocate-General of the British Army, which was called forth by and is in part a reply to the article of Mr. Cranston above referred to. It is shown that

the British system in many respects is similar to our own; but there are important points of difference. For example, the learned English Judge-Advocate-General remarks:

"Mr. Cranston has very properly pointed out that the presence of a Judge Advocate, to some extent, meets his objection of the want of legal training in the military members of the Court; but he adds that there is a risk of the Judge Advocate's ceasing to be sufficiently impartial if he also acts as prosecutor. In this last opinion I certainly concur, and I venture to hope that those responsible for the law of American Courts-Martial will not hesitate to profit by our experience, because with us there is a Prosecutor, generally the Adjutant of the regiment, independent of the Judge Advocate. The Judge Advocate acts very much as the Attorney-General acts in peerage cases in the House of Lords. He states his view of legal points, and if necessary he sums up the case, pointing out the issues and the evidence relating to them, but he leaves it to the tribunal to decide."

The fact that the functions of advocate and judge have practically been separated in England is a strong argument for at least that measure of reform here. But, if a change be made, we see no good reason why it should not be carried to logical completion by placing the real arbiter of legal points on the bench. For reasons above set forth, we are unable to share Sir Francis Jeune's apprehension that the military members of an American court would leave the facts as well as the law to the determination of the civilian judge. He contends, furthermore, that British officers as a class are sufficiently versed in the law of evidence and law in general to discharge the judicial function. However this may be, experience amply demonstrates that American officers are not capable of conducting military trials to the approval of scientific jurists, or even to popular satisfaction. It seems altogether probable that the existing British system represents a modification of the original type of Court-Martial to conform by analogy to British civil institutions. It is submitted that the plan of reform outlined in this article would modify the same original type in a manner similarly agreeable by analogy to the juridical ideals and standards of the United States.

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